

**STATE OF WISCONSIN
Department of Commerce**

In the Matter of the PECFA Appeal of

Gregory E. Jones
Jonzy Market
994 206th Ave
Luck WI 54853

PECFA Claim #54810-2324-43
Hearing #04-178

Final Decision

PRELIMINARY RECITALS

Pursuant to a petition for hearing dated June 28, 2004, under Wis. Stat. § 227.46(3)(a), to review a decision by the Department of Commerce, a hearing was held in the above-entitled matter on February 9, 2005, at Madison, Wisconsin.

The issue for determination is: **Whether the department's decision dated June 11, 2004 was correct with regard to the disputed costs identified in petitioner's appeal received by the Department July 6, 2004.**

There appeared in this matter the following persons:

PARTIES IN INTEREST:

Gregory E. Jones
Jonzy Market
994 206th Avenue
Luck, WI 54853

By: Consultant
Craig P. Wilson
Environmental Troubleshooters, Inc.
3825 Grand Avenue
Duluth MN 55807

Department of Commerce
PECFA Bureau
201 West Washington Avenue
PO Box 7838
Madison WI 53707-7838

By: Joseph R. Thomas
Assistant Legal Counsel
Department of Commerce
201 W. Washington Ave.
PO Box 7838
Madison, WI 53707-7838

The authority to issue a final decision in this matter has been delegated to the undersigned by order of then Secretary Cory L. Nettles dated January 10, 2005.

This matter was conducted, pursuant to written notice provided to the parties, as an expedited hearing before Steven Wickland, administrative law judge (ALJ) presiding. Craig Wilson, president of consultant Environmental Troubleshooters, Inc.(ET), testified on behalf of Jonzy Market by telephone, and participated in all aspects of the hearing by teleconference. Department of Commerce (Department) staff Rosie Fiscus, with the PECFA program, provided testimony on the issue. Department staff Renee Dickey also testified.

The matter now being ready for decision, I hereby issue the following:

FINDINGS OF FACT

1. Jonzy Market owns a site at 103 185th Avenue, Balsam Lake, Wisconsin, PECFA No. 54810-2324-43. The appellant Gregory Jones, Jonzy Market submitted its claim for reimbursement of the costs incurred in the remediation of the petroleum-contaminated site in the amount of \$76,155.87. The total dollars reviewed were \$62,902.62. (Respondent exhibit R-3.)
2. The Department administers the petroleum environmental cleanup fund program (PECFA). The Department made a total PECFA payment to appellant of \$56,305.37 (an amount arrived after subtracting deductibles and non-eligibles) on June 11, 2004. By its June 11, 2004 letter entitled Breakdown of PECFA Costs (Respondent Exhibit 3), the Department denied as ineligible \$ 1,002.23. (Fiscus testimony and Respondent Exhibit 1.) Department counsel asserted at hearing (and ET did not dispute) that costs for well abandonment were paid by the Department, but not interest costs related thereto after February 16, 2004.

3. The appellant, Gregory Jones, Jonzy Market, by its consultant ET, submitted a PECFA appeal dated April 27, 2004 that was received by the Department on May 7, 2004. (Respondent exhibit 4 and Fiscus testimony.)
4. Rosemary Fiscus, Department PECFA program, testified on behalf of the Department. As a member of the PECFA claim review program, she has reviewed 983 claims in her four years in that position. Fiscus testified that she made the claim review in this case. She determined that the December 16, 2003 Department of Natural Resources (DNR) letter to appellant Gregory Jones, Jonzy Market provided notice that no further remediation is necessary at the site. At issue is the amount that was denied as ineligible, totaling \$998.82 (of the total \$1002.23 denied).
5. Basis for Department denial. Respondent Exhibit 3 includes as an attachment an eight-page document category report (Report) detailing Department reasons for specific denials. The Report finds that \$998.82 is non-eligible, stating “INT [interest] after 02/16/04 not eligible per 101.143(4)(cc) 1.a”. (Respondent Exhibit 3 attachment page 6.) The \$998.82 is interest that accrued after the February 16, 2004 (or 60-day portion of the statutory) deadline, based on the 120-day provision in the statute cited. The 120 days is calculated as of 120 days from the December 16, 2003 date of the Department of Natural Resources’ (DNR) closure letter. Thus, the deadline date for filing a claim with the Department is (no later than) April 16, 2004.
6. The December 16, 2003 DNR closure letter to Gregory Jones advises that no further work is required at the site, stating: “The [DNR] Closure Committee reviews environmental remediation cases for compliance with state rules and statutes to maintain consistency in the closure of these cases. After careful review of the closure request, the Closure Committee has determined that the unleaded gasoline and diesel fuel contamination on the site appears to have been investigated and remediated to the extent practicable under site conditions. Your case has been remediated to Department [of Natural Resources’] standards in accordance with s. NR 726.05, Wis. Adm. Code....” (Respondent Exhibit 1, page 1.) The DNR closure letter further refers to the need to timely file any claim within 120 days to maintain any claim for interest costs: “If this is a PECFA site, section 101.143, Wis. Stats., requires that PECFA claimants seeking reimbursement of interest costs, for sites with petroleum contamination, submit a final reimbursement claim with 120 days after they receive a closure letter on their site. For claims not received by the PECFA Program within 120 days of the date of this letter, interest costs after 60 days of the date of this letter will not be eligible for PECFA reimbursement.” (Respondent Exhibit 1.) (Emphasis added.)
7. The Department sends the Department’s PECFA updates to every registered engineering consultant firm in the state, to interpret state statutes and administrative rules. PECFA Update #16 dated September 2001 explains the 120-day provision for interest reimbursement and how the Department would interpret that provision. (Respondent Exhibit 7, and Fiscus testimony.) Craig Wilson noted during the hearing the receipt of this PECFA update.

8. Appellant's consultant, ET, submitted its claim for reimbursement of costs by its letter of April 27, 2004. (Respondent Exhibit 4.) The letter bears a stamped received date by the Department of May 07, 2004. (Respondent Exhibit 4.) This date is more than 120 days after the date of the December 16, 2003 DNR closure letter, specifically 143 days after. (Respondent exhibits 4, 5, 6 and Fiscus testimony.)
9. Fiscus testified that the Department's decision on non-eligible costs was proper.
10. Renee Dickey testified that she has worked in the PECFA program for nine years. She reviews claims for reimbursement under the PECFA Fund. She reviews reports as to work done, including invoices, cancelled checks submitted with the claim, and other documentation. Ms. Dickey did not participate in this review. She did receive a call from ET staff on this claim, asking if ET could file a claim without locating or filing a tank inventory form. Ms. Dickey advised that the claim could be submitted without that form and still be considered complete. Even if complete, a claim must also be submitted within the 120-day time period, as to reimbursement of interest costs. Respondent Exhibit 8 provides the "ET Phone Log" of this conversation, noted on the phone log as occurring on March 2, 2004. Ms. Dickey testified that she has no authority to waive statutory penalties. She made no log or notes of the conversation, as it is not necessary Department procedure to keep a phone log on claims.
11. ET Consultant Craig Wilson, Duluth, MN, testified on behalf of appellant. He stated his opinion that even after the DNR closure letter went out, there remained additional tasks, notably abandon of wells, that needed to be accomplished, and that this should affect or extend the closure date.
12. The final closure letter is dated February 12, 2004.
13. Respondent exhibits 1 through 8 were offered into evidence, as was appellant's Exhibit A-1. There were no objections and those exhibits were admitted into evidence.

APPLICABLE STATUTES AND CODE PROVISIONS

Wisconsin Stat. §101.143(4)(cc) provides, in part, as follows:

(cc) Ineligibility for interest reimbursement. 1.a. Except as provided in subd. 1m or 2., if an applicant's final claim is submitted more than 120 days after receiving written notification that no further remedial action is necessary with respect to the discharge, interest costs incurred by the applicant after the 60th day after receiving that notification are not eligible costs.

DISCUSSION

Interest amounts denied based on the 120-day statutory provision

Wisconsin Stat. §101.143(4)(cc), Ineligibility for interest reimbursement provides, with exceptions that don't apply here, that "if an applicant's final claim is submitted more than 120 days after receiving written notification that no further remedial action is necessary with respect to the discharge, interest costs incurred by the applicant after the 60th day after receiving that notification are not eligible costs."

The December 16, 2003 DNR closure letter states that, in fact, the site has been remediated to the extent practicable under site conditions. Thus, it is reasonable to conclude that no further remedial action is necessary. In order for appellant to have certain interest charges eligible for reimbursement, the claim should have been filed with 120 days, or, no later than April 16, 2004. As the ET letter is date-stamped received by the Department on May 7, 2004, the letter was filed beyond the 120-day period. Therefore, the interest incurred by the appellant during the relevant statutory period is ineligible and therefore the interest amount of \$998.82 was properly denied. Wis. Stat. § 101.143(4)(cc) is clear in requiring that the 120-day period be met, and it was not met in this case.

CONCLUSIONS OF LAW

1. The appellant was an owner of a property covered by the remedial provisions of Wis. Stat. § 101.143.
2. The DNR closure letter (Respondent Exhibit 1), by stating that the site has been remediated to the extent practicable, did, on December 16, 2003 begin the statutory 120-day period of Wis. Stat. § 101.143(4)(cc) 1.a. running. The 120-day period concluded before the receipt date by the Department of the appellant's claim (which, having been received on May 7, 2004, was received 143 days after December 16, 2004). Therefore, interest costs incurred by the appellant after the 60th day after receiving the DNR closure letter are ineligible for reimbursement. Wisconsin Stat. §101.143(4)(cc).
3. Well abandonment and related tasks are not part of remediation and therefore work on those tasks does not extend the closure date notice of December 16, 2003 in this case.

DECISION

The Department's decision to deny the amount appealed herein is affirmed.

NOTICE TO PARTIES

Request for Rehearing

This is a final agency decision under §227.48, Stats. If you believe this decision is based on a mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision and which you could not have discovered sooner through due diligence. To ask for a new hearing, send or deliver a written request to Rehearing Request, Department of Commerce, Office of Legal Counsel, 201 W. Washington Avenue, 6th Floor, PO Box 7970, Madison, WI 53707-7970. Rehearing requests may also be filed by fax at the following number: (608) 266-3447. Faxed rehearing requests received after 4:30 p.m. on a business day will be filed effective the next business day.

Send or fax a copy of your request for a new hearing to all the other parties named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the hearing examiner made and why it is important. Or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain how your request for a new hearing is based on either a mistake of fact or law or the discovery of new evidence which could not have been discovered through due diligence on your part, your request will have to be denied.

Your request for a new hearing must be received no later than 20 days after the mailing date of this decision as indicated below. Late requests cannot be granted. The process for asking for a new hearing is in Sec. 227.49 of the state statutes.

Petition For Judicial Review

Petitions for judicial review must be filed no more than 30 days after the mailing date of this hearing decision as indicated below (or 30 days after a denial of rehearing, if you ask for one). The petition for judicial review must be served on the Secretary, Department of Commerce, Office of the Secretary, 201 W. Washington Avenue, 6th Floor, PO Box 7970, Madison, WI 53707-7970.

The petition for judicial review must also be served on the other "PARTIES IN INTEREST" and counsel named in this decision. The process for judicial review is described in Sec. 227.53 of the statutes.

Dated: _____

Steven Wickland
Administrative Law Judge
Wisconsin Department of Commerce
PO Box 7838
Madison WI 53707-7838

copies to:

Gregory Jones
994 206th Avenue
Luck, WI 54853

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Environmental Troubleshooters, Inc.
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Date Mailed: _____

Mailed By: _____